

1 EVANS LAW FIRM, INC.
2 Ingrid M. Evans (CA State Bar No. 179094)
3 3053 Fillmore Street, #236
4 San Francisco, CA 94123
5 Tel: (415)-441-8669
6 Tel: (888) 503-8267

7 FRANCIS & MAILMAN, P.C.
8 James A. Francis (*Pro Hac Vice*)
9 John Soumilas (*Pro Hac Vice*)
10 David A. Searles (*Pro Hac Vice*)
11 Lauren KW Brennan (*Pro Hac Vice*)
12 Land Title Building, Suite 1902
13 100 South Broad Street
14 Philadelphia, PA 19110
15 Tel: (215) 735-8600
16 Fax: (215) 940-8000

17 Attorneys for Plaintiff
18 AMIT PATEL and the Class

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

19 AMIT PATEL, on behalf of himself and all
20 others similarly situated,

21 Plaintiffs,

22 v.

23 TRANS UNION, LLC in its own name and
24 t/a TRANS UNION RENTAL SCREENING
25 SOLUTIONS, INC. and TRANSUNION
26 BACKGROUND DATA SOLUTIONS, and
27 TRANS UNION RENTAL SCREENING
28 SOLUTIONS, INC. in its own name and t/a
TRANSUNION BACKGROUND DATA
SOLUTIONS,

Defendants.

Case No. 3:14-cv-00522-LB

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
AWARD OF ATTORNEYS' FEES
AND REIMBURSEMENT OF
COSTS AND EXPENSES**

Date: March 8, 2018

Time: 9:30 a.m.

Place: Courtroom C

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1 Plaintiff Amit Patel and the Class, by the undersigned Class Counsel, respectfully submit this
 2 Memorandum of Law in support of their Motion for Award of Attorneys' Fees and Reimbursement
 3 of Costs and Expenses.

4 **I. INTRODUCTION**

5 This Court preliminarily approved the class action settlement negotiated between the Parties
 6 in this action on October 26, 2017 (ECF 153).¹ Now, after almost four years of hard-fought litigation,
 7 motion practice, interim appeal, discovery, and negotiation that resulted in the settlement, Class
 8 Counsel move for an award of attorneys' fees and reimbursement of costs as provided by the
 9 Settlement Agreement, § 9(a). The amount sought is reasonable in accordance with the percentage
 10 of recovery method as cross-checked by the lodestar method of awarding attorneys' fees.

11 The settlement's value, which directly resulted from the efforts of Class Counsel, is
 12 substantial. The Settlement Agreement requires Defendants to establish a Settlement Fund of
 13 \$8,000,000.00. This sum shall be used to pay all Class Members an Automatic Payment of \$400
 14 each (without the need to file a claim), with an option to submit a claim to be paid a *pro rata* share
 15 of a Claims Made Pool. *Id.* §§ 8, 10(b). Further, the Fund will pay for costs of notice and settlement
 16 administration, a service award to the Class Representative, and counsel fees and costs.

17 Class Counsel now, as compensation for their achievement and effort, and for accepting the
 18 risk that there would be no recovery if they were not successful, request the Court approve an award
 19 equal to one-third of the Settlement Fund, \$2,666,666.66, for the total of attorneys' fees and expenses.

20 As detailed below, Class Counsel's efforts and risks clearly justify the requested award of
 21 fees and reimbursement of expenses. In support of their application approving payment for fees and
 22 reimbursement of expenses, Class Counsel rely upon the Declaration of James A. Francis ("Francis
 23 Dec.") and the Declaration of Ingrid Evans ("Evans Dec."), including Class Counsel's time and the
 24 expenses incurred on behalf of the Plaintiff and Class, filed herewith.

25 The reaction of the Class supports the request for fees and expenses. The Notice provided to
 26 Class Members expressly informed them that Class Counsel would apply for an award of attorneys'

27 ¹ Capitalized terms herein shall have the same meaning as defined in the Settlement Agreement
 28 (ECF 145-1) unless otherwise defined herein.

1 fees and costs not to exceed one-third of the Settlement Fund. To date, no Class Member has
 2 objected to the fee and costs requested,² which evidences both a satisfactory result and a reasonable
 3 fee.

4 **II. PROCEDURAL HISTORY**

5 The settlement in this matter is the result of vigorous advocacy, extensive discovery and
 6 motion practice, and contested, protracted settlement negotiations. The case was undertaken and
 7 pursued on a contingent basis and represented a financial risk for Class Counsel.

8 A detailed recitation of the background and procedural history of the case is set forth in
 9 Plaintiff's Motion for Final Approval of Class Action Settlement, filed contemporaneously herewith.
 10

11 **III. CLASS COUNSEL'S FEE REQUEST SHOULD BE**
 12 **APPROVED AS FAIR AND REASONABLE**

13 Federal Rule of Civil Procedure 23(h) provides: "In a certified class action, the court may
 14 award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties'
 15 agreement." The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, *et seq.* ("FCRA"), is a fee-
 16 shifting statute that mandates the award of attorney's fees and costs to a prevailing party. 15 U.S.C.
 17 §§ 1681n(a)(3), 1681o(a)(2).

18 **A. Methods Of Determining An Appropriate Fee**

19 "In the Ninth Circuit, there are two primary methods to calculate attorney's fees: the lodestar
 20 method and the percentage-of-recovery method." *In re Online DVD-Rental Antitrust Litig.*, 779
 21 F.3d. 934, 949 (9th Cir. 2015). Regardless of which of the two methods is used, the award must be
 22 reasonable when considered in light of the circumstances of a particular case. *Powers v. Eichen*,
 23 229 F.3d 1249, 1258 (9th Cir. 2000).

24 **1. Percentage-of-the-Fund Method**

25 Generally, under the percentage method, a court assesses the amount of the common fund by
 26 determining the value of the benefits that the settlement agreement confers upon the class and then

26 ² The only objection to the Settlement was filed December 1, 2017 (ECF 155). The objection
 27 did not reference the fees and costs requested, and was later withdrawn (ECF 156).

1 awards a percentage of that fund as attorneys' fees. *Staton v. Boeing Co.*, 327 F.3d 938, 974-75 (9th
 2 Cir. 2003).

3 In the Ninth Circuit, the typical range of acceptable attorneys' fees is 20% to 33 1/3% of the
 4 total settlement value, with 25% considered to be the "benchmark." *Powers*, 229 F.3d at 1256; *see*
 5 *also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) ("This circuit has established
 6 25% of the common fund as a benchmark award for attorney fees."); *Six (6) Mex. Workers v. Ariz.*
 7 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Rodriguez v. D.M. Camp & Sons*, No.: 1:09-
 8 cv-00700-AWI-JLT, 2013 WL 2146927, at *13 (E.D. Cal. May 15, 2013) ("In the Ninth Circuit, the
 9 typical range of acceptable attorneys' fees is 20% to 33 1/3% of the total settlement value, with 25%
 10 considered the benchmark" and granting fee request of 30% of \$675,000 common fund).

11 "However, in most common fund cases, the award exceeds [the 25%] benchmark." *In re*
 12 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) (*citing In re Activision Secs.*
 13 *Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("This court's review of recent reported cases
 14 discloses that nearly all common fund awards range around 30% even after thorough application of
 15 either the lodestar or twelve-factor method.")).³

16

17 ³ *See also Johnson v. General Mills, Inc.*, 2013 WL 3213832, at *6 (C.D. Ca. June 17, 2003)
 18 (awarding fees amounting to "30% of the total settlement fund" and observing that "[o]ther courts
 19 have regularly awarded fee amounts above the benchmark in common fund cases.") (*citing Vasquez*
 20 *v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) ("The typical range of acceptable
 21 attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25%
 22 considered the benchmark. However, the exact percentage varies depending on the facts of the case,
 23 and in most common fund cases, the award exceeds that benchmark.") (internal quotation marks and
 24 citations omitted)); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL
 25 2117001 at *19 (E.D. Cal. June 11, 2012) (approving attorney fee award that represented 32.1% of
 26 the total class settlement amount); *Franco v. Ruiz Foods Prods., Inc.*, No. 1:10-cv-02354-SKO, 2012
 27 WL 5941801 at *18 (E.D. Cal. Nov. 27, 2012) (holding attorney's fees award of 33 percent of the
 28 total class settlement amount as fair and reasonable); *Adoma v. Univ. of Phoenix, Inc.*, No. CIV. S-
 10-0059 LKK/GGH, 2012 WL 6651141 (E.D. Cal. Dec. 20, 2012) (approving attorneys' fees award
 that represented 29% of the common fund); *Hofstetter v. Chase Home Finance, LLC*, No. C 10-1313
 WHA, 2011 WL 5545912 at *2 (N.D. Cal. Nov. 14, 2011) (granting attorney's fee award that
 represented 32 percent of class settlement); *Knight v. Red Door Salons, Inc.*, No. 08-01520-SC, 2009
 WL 248367 at *5 (N.D. Cal. Feb. 2, 2009) (awarding fees amounting to 30% of common fund); *In*
re Heritage Bond Litig., No. 02-ML-1475-DT, 2005 WL 1594403 at *19-21 (C.D. Cal. June 10,
 2005) (awarding fees amounting to one-third of the common fund and citing *In re Mego Fin. Corp.*
Sec. Litig., 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of fees equal to one-third of total

1 As the Ninth Circuit has held, “[t]he 25% benchmark rate, although a starting point for
 2 analysis, may be inappropriate in some cases. Selection of the benchmark or any other rate must be
 3 supported by findings that take into account all of the circumstances of the case.” *Vizcaino v.*
 4 *Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). Thus, in *Vizcaino*, the Ninth Circuit
 5 approved an award of attorneys’ fees amounting to 28% of the \$96,885,000 settlement in that case,
 6 which was based on the district court’s consideration of factors including the excellent results
 7 achieved by counsel, the risky nature of the representation, the benefits generated for the class in
 8 that case “beyond the cash settlement fund,” the market rate for such contingency representation,
 9 and the length and expense of the litigation. *Id.* at 1048-50; *see also In re Washington Public Power*
 10 *Supply System Secs. Litig.*, 19 F.3d 1291, 1299-1302 (9th Cir. 1994) (holding district court abused
 11 its discretion in failing to apply risk multiplier to lodestar).

12 In this case, the Settlement provides for, and Plaintiff has requested, attorney’s fees and
 13 reimbursable expenses totaling \$2,666,666.66. After deduction of expenses, the fees requested here
 14 total \$2,576,131.10, which is 32% of the \$8,000,000 Settlement Fund. The fee request constitutes a
 15 multiplier of approximately 2.02 of Class Counsel’s lodestar, as discussed below, and is well within
 16 the range of approval for a non - “Mega Fund” case.

17 **2. The Lodestar Method**

18 Under the lodestar method, a court “calculates the fee award by multiplying the number of
 19 hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to
 20 account for the risks associated with the representation.” *Paul, Johnson, Alston & Hunt v. Graulty*,
 21 886 F.2d 268, 272 (9th Cir. 1989); *see also Staton*, 327 F.3d at 965.

22 **B. Class Counsel’s Fee Request Is Reasonable Under the Percentage Method**

23 **1. The Value of the Settlement**

24 The total monetary settlement is valued at eight million dollars. The requested award, for

25
 26 recovery); *In re Public Ser. Co. of New Mexico*, No. 91-00536-M, 1992 WL 278452 at *1, *12 (S.D.
 27 Cal. July 28, 1992) (awarding one-third); *Antonopoulos v. N. Am. Thoroughbreds, Inc.*, No. 87-00979-
 28 G-CM, 1991 WL 427893 at *1, *4 (S.D. Cal. May 6, 1991) (awarding one-third); *In re M.D.C. Holdings Sec. Litig.*, No. 89-00090-E-M, 1990 WL 454747 at *1, *10 (S.D. Cal. Aug. 30, 1990)
 (awarding 30% attorneys’ fee plus expenses)).

1 both fees and costs, is 33% of the Settlement Fund. This is in line with awards in comparable cases
 2 and merited by the results achieved and the work performed by Class Counsel to achieve those
 3 results.

4

5 **2. The Requested Fee Percentage Is Reasonable in Comparison to Awards**
in Similar Cases

6 A review of attorney fee awards in similar size cases supports the requested fees here – indeed,
 7 the requested fees here represent a smaller percentage of the common fund than many awards in
 8 similar or slightly larger cases. *See Williams v. Brinderson Constructors, Inc.*, C.A. No. 15-2474
 9 (ECF 50 at 7) (C.D. Cal. Feb. 6, 2017) (cases awarding percentages such as 30-50 percent of the
 10 fund involved relatively smaller funds of less than \$10 million), citing *Van Vranken v. Atlantic*
 11 *Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995). *See also, e.g., Hicks v. Toys "R" US –*
 12 *Delaware, Inc.*, 2014 WL 4670896 (C.D. Cal. Sept. 2, 2014) (awarding 33% of fund of \$4 million);
 13 *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, * (C.D. Cal. July 21, 2008) (award of
 14 34% of \$10 million fund citing an academic study collecting contingency fee agreements); *Strougo*
 15 *ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (granting
 16 attorneys' fees in amount of 33 1/3% of \$1.5 million settlement fund); *Maley v. Del Global Techs.*
 17 *Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33.3% of \$3.8 million settlement fund);
 18 *Kidrick v. ABC Television & Appliance Rental*, 1999 WL 1027050, at *1-2 (N.D. W. Va. May 12,
 19 1999) (awarding 30.6% of approximately \$400,000 settlement fund, noting that “[a]n award of fees
 20 in the range of 30% of the fund has been held to be reasonable Fees as high as 50% of the fund
 21 have been awarded.”) (internal citations omitted).

22 As this settlement, under \$10 million, is on the smaller side of class settlements, the request
 23 for an award of one-third of the Settlement Fund, which includes both fees and costs, is reasonable.

24

25 **3. The Circumstances of the Case Support the Requested Fees and**
Reimbursement of Expenses

26 Assessing an appropriate fee based on a percentage of the fund involves taking into account
 27 “all of the circumstances of the case.” *Vizcaino*, 290 F.3d at 1048. The Ninth Circuit’s analysis in
 28 *Vizcaino* is instructive. In that case, Microsoft denied employee stock purchase and savings plan

1 benefits to employees it denominated as “freelance.” It placed \$96,885,000 into a class action
 2 settlement fund. The court in *Vizcaino* ultimately approved attorney’s fees of up to 28% of the
 3 settlement fund based on analysis of five “relevant circumstances”: (1) counsel “achieved
 4 exceptional results for the class … in the absence of supporting precedents … and against
 5 Microsoft’s vigorous opposition throughout the litigation”; (2) the case was extremely risky for class
 6 counsel; (3) counsel’s performance generated benefits beyond the cash settlement fund (Microsoft
 7 agreed to change its personnel classification practices and class members also received non-
 8 monetary benefits associated with full-time employment); (4) the 28% rate awarded was at or below
 9 the market rate; and (5) the burdens of representation of the class on a contingency basis over
 10 significant time, incurring costs and expenses, and requiring counsel to forego significant other
 11 work, resulting in a decline in the firm’s annual income. *Id.* at 1048-49. Factors that the Ninth
 12 Circuit has deemed relevant in determining whether a fee award is reasonable include: (a) the results
 13 of Class Counsel’s efforts; (b) the complexity of the issues in the case, and the attendant risks they
 14 presented; and, (c) whether the fee is within the range typically associated with cases of this kind.
 15 *Id.* at 1048-50.

16 Plaintiff’s request is reasonable under the Ninth Circuit’s percentage-of-the-fund approach,
 17 as stated in *Vizcaino*. Class Counsel’s efforts produced very good results. The settlement establishes
 18 a \$8,000,000 Settlement Fund, provides for sizeable automatic payments to each Class member and
 19 provides a simple, streamlined option for submitting a claim for even more money.

20 Class Counsel were only able to prosecute this case so effectively and efficiently by virtue of
 21 their considerable experience in this area of the law. Class Counsel specialize in consumer class
 22 actions, have served as counsel for classes of plaintiffs in a variety of substantive areas, and have
 23 had extensive involvement in class action issues outside of litigation itself. (Francis Dec.; Evans
 24 Dec.) Hence, the fee requested is reasonable.

25 The contested issues in the litigation were complex, including determinations of whether
 26 Plaintiff had Article III standing to assert his claims, whether the Defendants were related entities
 27 such that Defendant Trans Union, LLC was liable for the actions of Defendant Trans Union Rental
 28

1 Screening Solutions, Inc., whether Plaintiff met all the elements of Rule 23 and whether Defendants' 2 actions were willful within the meaning of the FCRA.⁴ Had the case not settled, these issues would 3 have continued to be hotly contested. Armed with sufficient discovery and a well-researched and 4 thought-out assessment of the likelihood of success of upholding the Class Certification Order and 5 prevailing on the merits, the Parties eventually resumed the initially unsuccessful attempt to mediate 6 the case. Ultimately, the Parties finalized a written settlement agreement after the last mediation 7 session, followed by numerous conference calls, spanning a period of six months.

8 Finally, the risks of litigation faced by Class Counsel in this case were significant, and Class 9 Counsel faced the very real possibility of gaining nothing for their efforts. Class certification always 10 poses a risk and often involves an expensive and prolonged battle of experts in connection with 11 certification, merits, and damages issues. If Plaintiff had been unable to certify a class, the case 12 would effectively be over, and the Class and its counsel would gain nothing from continued 13 litigation. While Plaintiff did prevail at class certification, proving liability on the merits would 14 require further risky litigation and possibly additional expert work. Even if Plaintiff successfully 15 passed the liability hurdles, a battle would ensue concerning whether Plaintiff and other Class 16 Members sustained damages and, if so, the proper measure of those damages, requiring yet more 17 expert testimony and entailing further risks to Plaintiff's and the Class's chances of recovery. 18 Although Class Counsel were and remain confident in the strength of their case and have been 19 prepared to litigate it through trial at all times, the risks were numerous and real.

20 In short, Class Counsel have earned the award they seek, the request is reasonable and there 21 are no special circumstances that would justify a downward adjustment. The requested award easily 22 satisfies any test or yardstick, not only because of the results Class Counsel achieved for the Class 23 and the risks of receiving nothing if they did not succeed, but because they made a conscious effort 24 not to overreach.

25

26 ⁴ See *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69 (2007) (willfulness standard 27 is not met "unless the action is not only a violation [of the FCRA] under a reasonable reading of 28 the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.").

C. Class Counsels' Fee Request Is Also Reasonable Under The Lodestar Method

1. Counsels' Lodestar Is Reasonable

Class Counsel's lodestar in this case is \$1,273,572.45. The complexities of this case, the risks involved and the results obtained more than justify the base lodestar.

Counsel's hourly rates are the same as the regular current rates charged for their services in their standard non-class matters, including both contingent and non-contingent matters. The hourly rates of Lead Class Counsel, Francis & Mailman, P.C., are set based upon the opinions of independent outside counsel at the law firm of Fox Rothschild, LLP. Francis Dec., ¶ 20, Exhibit C (December 12, 2017 expert report of Abraham C. Reich, Esquire, Co-Chair and Partner for the law firm of Fox Rothschild, LLP), and Exhibit D (December 12, 2017 expert report of Jeffrey D. Polsky). As set forth in the Polsky Report, the requested hourly rates are appropriate in light of the rates charged by comparably skilled legal practitioners in the San Francisco legal market. As detailed in the Reich Report, these hourly rates are further supported by the contingent nature of the representation, the time and labor required, the requisite skill to perform the legal services properly, the experience, reputation and ability of the lawyers, and the results obtained.

The hourly rates of the Evans Law Firm have been approved by both federal and California state courts in numerous fee applications; similar rates have been approved in other cases, which supports the reasonableness of the rates requested herein. *See* Evans Dec., ¶ 10, n. 1.

Counsel spent 2,117 hours litigating this case through to the hearing on final approval. Additionally, they incurred \$90,535.56 in expenses. This action was taken on a contingent basis; thus, Counsel was unable to mitigate any of the risk of nonpayment and, in fact, were required to spend monies to effectively litigate.

2. Despite Significant Hurdles, Class Counsel Secured Substantial Benefits for the Class

In determining whether a lodestar is reasonable, courts often evaluate the risks involved and the results class counsel obtained for the Class. *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1008-09 (9th Cir. 2002); *WPPSS*, 19 F.3d at 1299; *Clark v. City of Los Angeles*, 803 F.2d

1 987, 990-91 (9th Cir. 1986). Here, Class Counsel put their class action experience⁵ to work in
 2 securing substantial benefits for the Class, despite significant risks.

3 This case was far from a “slam dunk.” Defendants challenged many of Plaintiff’s theories
 4 in their answers, their motion to stay, their opposition to class certification and their motion to
 5 decertify the Class, as well as during the mediation and settlement negotiations.

6 Furthermore, Class Counsel’s efforts produced very good results. The settlement establishes
 7 a sizeable Settlement Fund of \$8,000,000.00, with a minimum payment of \$400.00 to Class
 8 Members, and the option of seeking even more.

9 Finally, the contested issues in the litigation were complex, including determinations of
 10 whether Plaintiff was typical and adequate to represent other housing applicants, whether he and the
 11 Class suffered particularized and concrete harm from Defendants’ actions and omissions, and
 12 whether Defendants’ actions were willful within the meaning of the FCRA. These issues were hotly
 13 contested and were subject to a motion to dismiss. Settlement negotiations took place in January
 14 2015 and then later in May 2017. The sessions were overseen by two highly respected mediators,
 15 and then there were the numerous follow-up conference calls and exchange of written terms and
 16 conditions of settlement.

17 **D. Class Counsel Should Be Reimbursed for Their Expenses.**

18 In addition to their request for attorneys’ fees, pursuant to the Settlement Agreement,
 19 Plaintiff and Class Counsel seek reimbursement from Defendants for litigation expenses incurred,
 20 totaling \$90,535.56. Francis Dec., ¶ 24; Evans Dec., ¶ 11. An award of reasonable fees should also
 21 include reimbursement for litigation expenses reasonably incurred in prosecuting the case. *Beasley*
 22 *v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419-20 (1991).

23 Under the common fund doctrine, Class Counsel are entitled to reimbursement of all
 24 reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining
 25 settlement, including expenses incurred in connection with document productions, depositions,
 26 travel, mediation and other litigation-related expenses that would typically be billed to paying

27 ⁵ In the accompanying Declarations, Class Counsel detail their years of experience in litigating
 28 consumer class actions.

1 clients. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Class Counsel has reviewed
2 accounting records and invoices and can attest to the appropriateness and necessity of the costs.
3 Francis Dec., ¶¶ 24-25; Evans Dec., ¶ 11. The requested expenses and costs are the type routinely
4 billed by attorneys in such litigation and are reasonable.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Plaintiff and Class Counsel request that this Court approve
7 payment of \$2,666,666.66 for attorneys' fees and reimbursement of litigation expenses.
8

9 Respectfully submitted,

10 DATE: February 22, 2018

FRANCIS & MAILMAN, P.C.

11 By: /s/ James A. Francis
12 James A. Francis (*pro hac vice*)
13 John Soumilas (*pro hac vice*)
14 David A. Searles (*pro hac vice*)
15 Lauren KW Brennan (*pro hac vice*)
16 Land Title Bldg., Suite 1902
17 100 South Broad Street
18 Philadelphia, PA 19110
19 Telephone: (215) 735-8600
20 Facsimile: (215) 940-8000
21 jfrancis@consumerlawfirm.com
jsoumilas@consumerlawfirm.com
dsearles@consumerlawfirm.com
lbrennan@consumerlawfirm.com

22 Ingrid M. Evans (CA State Bar No. 179094)
23 **EVANS LAW FIRM, INC.**
24 3053 Fillmore Street, #236
25 San Francisco, CA 94123
26 Ingrid@evanslaw.com
27 Tel: (415)-441-8669
28 Tel: (888) 503-8267